BRB No. 98-0555

THURMAN R. KOCH	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
BAROID DRILLING FLUIDS	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

John A. Keller (The Keller Firm), Mandeville, Louisiana, for claimant.

Jason B. Boudreaux and Michael J. Remondet (Jeansonne & Remondet), Lafayette, Louisiana, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (96-LHC-2146) of Administrative Law Judge James W. Kerr, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On August 10, 1994, claimant injured his neck while working for employer as a crewman. On August 15, 1994, Dr. Budden, an orthopedic surgeon, diagnosed a cervical strain and recommended physical therapy. When Dr. Budden re-evaluated claimant on August 24, 1994, he found his entire physical examination to be objectively normal, and opined that claimant could work as long as he was not required to perform heavy lifting. A cervical MRI was performed which was normal, as were x-rays. On October 5, 1994, Dr. Budden noted that claimant informed him that he was practically back to normal, and had arranged to return to work on October 13, 1994. At that time, Dr. Budden released claimant to return to work without restrictions. CX-10 at 8.

Claimant thereafter performed his usual work duties from October 13, 1994, until March or April 1995. At that time, claimant stopped working, allegedly due in part to pain from the work injury, but also to take care of his wife, who was bedridden because she was pregnant with twins. After leaving employer, claimant went to work in his father's restaurant as a manager, where he also had to wash dishes and bus tables. Although claimant alleged that he remained symptomatic throughout the entire period in which he worked, Tr. at 47-48, the record is devoid of evidence that he sought any medical attention until August 16, 1995. At that time, claimant came under the care of Dr. Cenac, a Board-certified orthopedic surgeon, who opined that claimant was temporarily disabled due to residuals from his work injury. Based on Dr. Cenac's recommendation, claimant stopped working. A cervical myelogram performed showed a small diffuse bulge at C2-C3 which was ultimately determined not to be a surgical lesion. Thereafter, claimant was evaluated by a number of physicians, including Drs. Ponder, Trahant, and Montgomery, who could find nothing objective to explain claimant's continuing complaints of pain, noting that he exhibited a normal range of motion, normal test results, and a normal neurological exam.

Employer voluntarily paid temporary total disability compensation from August 11, 1994, until October 13, 1994, when claimant returned to his usual work for employer. On November 15, 1995, claimant filed a claim for additional temporary disability, CX-14 at 3, and employer received notice of the claim on November 20, 1995, CX-14 at 4, 6. On June 13, 1996, employer filed its initial Notice of Controversion, it which it disputed liability on the basis that claimant had filed a Jones Act suit against employer. On April 18, 1997, shortly before the scheduled hearing, employer filed a second controversion. Claimant objected that employer's submission of the second controversion was untimely, and argued that he accordingly was entitled to the disability claimed up to that time. As of the time of the initial hearing on April 24, 1997, claimant's status under the Act was no longer at issue. Inasmuch, however, as employer asserted that it had only become aware

that claimant was seeking temporary disability benefits one week previously and requested the opportunity to have an independent medical exam performed by Dr. Montgomery, the administrative law judge continued the hearing over claimant's objection until September 5, 1997. In addition, contemporaneous with the time of the initial hearing, employer agreed to accept liability for past due medical expenses.

In his Decision and Order, the administrative law judge denied the claim for additional disability compensation, finding that as of the time claimant returned to work for employer on October 13, 1994, he was capable of performing his usual work, and crediting evidence indicating that he had recovered from the work injury.[1] The administrative law judge further determined that claimant's actual earnings in that employment reasonably represented his wage-earning capacity considering his age, physical condition, lack of work restrictions and work history. In so concluding, he noted that there was no evidence that claimant was only able to perform this work because of employer's beneficence, and inferred that as claimant had performed his former work successfully without medical attention from October 1994 until March April 1995, he was not working in pain and only through extraordinary effort. The administrative law judge further concluded that when claimant stopped working for employer in 1995, he did so voluntarily and not because of the effects of his work injury. Inasmuch as employer voluntarily paid claimant temporary total disability compensation from August 11, 1994 until October 13, 1994, when he returned to his prior work, the administrative law judge determined that claimant had been fully compensated for his work-related injury and denied the claim for additional disability benefits accordingly. Claimant's claim for reimbursement of $918 for an MRI performed by Houma Radiological Associates in August 1995 and for various medications prescribed by Dr. Cenac was also denied by the administrative law judge, who found that these bills, which were incurred after claimant reached maximum medical improvement and had returned to work, were not compensable because the evidence did not establish that they were related to claimant's work

[1] In so concluding, the administrative law judge noted that there was no objective evidence to account for claimant's continuing complaints of pain and that employer had demonstrated suitable alternate employment as of October 13, 1994, when Dr. Budden released him to work without restrictions and claimant returned to his usual work.

injury. Claimant appeals the denial of his claim for disability and medical benefits. Employer responds, urging affirmance.

Claimant initially argues that fundamental fairness dictates that employer be held liable for the disability benefits claimed from August 16, 1995 until April 18, 1997 because the administrative law judge erred in overruling his objection to employer's untimely filing of its April 18, 1997, controversion. We disagree. In the present case, the administrative law judge clearly acted within his discretionary authority in allowing employer's April 18, 1997, controversion to be introduced into evidence; contrary to claimant's assertions, the fact that this filing may not have been timely under Section 14 of the Act, 33 U.S.C. §914, is irrelevant to its admissibility and does not, in any event, automatically entitle claimant to the claimed disability compensation. *See generally Picinich v. Seattle Stevedore Co.*, 19 BRBS 63 (1986); 20 C.F.R. §702.338.

Claimant further argues that employer should be held liable for the aforementioned benefits because the administrative law judge erred in continuing the hearing. The administrative law judge found that the hearing should be continued based on employer's assertion that it had only been made aware that temporary disability was in issue when it received Dr. Cenac's April 11, 1997 report. As claimant notes, however, it is evident from the face of his November 15, 1995, claim form and from other correspondence of record which employer received from the district director which predated Dr. Cenac's report that temporary disability was at issue. Although, the administrative law judge's rationale for continuing the hearing thus appears to be unsupported by the record, this fact amounts to no more than harmless error, and simply does mandate that claimant be awarded the compensation he seeks.

We also reject claimant's argument that the administrative law judge erred in failing to find that he remained temporarily totally disabled either through the date of hearing, alternatively until July 8, 1997, when he underwent an independent medical examination at employer's request by Dr. Montgomery, or until June 20, 1997, when Dr. Trahant, a psychiatrist/neurologist, indicated that following work hardening claimant could return to work. The burden is upon claimant to establish the nature and extent of his disability. In order to establish a *prima facie* case of total disability, claimant must prove that he is unable to perform his usual pre-injury employment. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985).

In the instant case, after considering the relevant evidence of record, the administrative law judge found that as of October 13, 1994, claimant was capable of performing his usual work. In so concluding, he noted that on October 5, 1994, Dr.

Budden released claimant to work without restrictions. Moreover, he noted that although claimant alleged that upon returning to work he remained symptomatic and went to see a doctor, no evidence was submitted to support this assertion. Rather, the administrative law judge found that claimant did not seek any medical treatment prior to seeing Dr. Cenac in August 1995, that all of claimant's objective testing was normal, and that no credible evidence had been submitted to substantiate his claim of continual pain or establish that he was incapable of performing his usual work. While recognizing that Dr. Cenac opined that claimant remained temporarily disabled through the time of the hearing, the administrative law judge found his conclusions in this regard questionable in light of the negative objective medical evidence and examinations of the other physicians of record. In addition, the administrative law judge found claimant's testimony regarding his pain symptoms to be self-serving and not supported by the facts. In discrediting claimant's testimony, the administrative law judge explicitly noted that he found it "interesting" that claimant, who alleged that he quit working for employer in March or April 1995 in part due to pain, thereafter went to work at his father's restaurant washing dishes and busing tables, and did not go to see a physician until he went to see Dr. Cenac in August 1995.

It is claimant's position that the administrative law judge's finding that claimant was no longer disabled as of October 13, 1994 is in error because none of the physicians of record, including employer's physician, Dr. Montgomery, opined that he was exaggerating or malingering. Moreover, claimant avers that there can be no finding that he is not totally disabled until such time that he undergoes the work hardening program recommended by Dr. Trahant, the functional capacity evaluation recommended by Drs. Cenac and Montgomery, or they have definitively released him to return to work. We disagree. It is solely within the discretion of the administrative law judge as the trier-of-fact to weigh the relevant evidence. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir.1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Based on his discrediting of claimant's and Dr. Cenac's testimony, the absence of objective medical evidence to substantiate claimant's complaints, and the fact that claimant actually performed his former work duties successfully from October 1994 until March or April 1995 and thereafter performed other strenuous work at his father's restaurant without requiring medical attention, the administrative law judge rationally concluded that claimant could perform his usual work duties as of the time he returned to work for employer on October 13, 1994. Inasmuch as the administrative law judge's finding that claimant could perform his usual work is rational and supported by substantial evidence, we affirm his denial of claimant's claim for

disability benefits.[2]

[2]Inasmuch as we affirm the administrative law judge's finding that claimant was not disabled after October 13, 1994, we need not address claimant's assertion that the administrative law judge erred in failing to find that the nature of his disability remained temporary up through the time of the hearing.

Claimant's argument that the administrative law judge erred in failing to find that he is entitled to reimbursement of $918 for the MRI performed by Houma Radiological Associates in August 1995, and for various medications prescribed by Dr. Cenac is similarly rejected. Based on the same evidence he relied upon in concluding that claimant was no longer disabled as of October 13, 1994, the administrative law judge rationally inferred that claimant was not entitled to reimbursement of these expenses because as of the time they were incurred, claimant had recovered from his work injury. Inasmuch as the administrative law judge's finding that claimant failed to establish that the medical expenses in question are related to his work injury is rational and supported by substantial evidence, his determination that these medical benefits are not compensable is affirmed.[3] *See Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993).

Claimant next argues that even if the administrative law judge properly determined that he was no longer disabled after October 1994, he is nonetheless entitled to additional compensation because employer's voluntary payments were based on an incorrect average weekly wage. Claimant maintains that although employer voluntarily paid temporary total disability benefits between April 11, 1994, and October 13, 1994, based on an average weekly wage of $308.86, the testimony of employer's service center manager, Gary Humble, establishes that claimant's annual earning capacity at the time of injury was $23,500 per year or $451.92 week, which would entitle him to an additional $95.38 for those nine weeks or a total of an additional $858.42. As the question of whether claimant was entitled to additional compensation prior to October 13, 1994, was raised below but not adjudicated by the administrative law judge, we remand the case for him to address this issue.

[3]Although claimant argues that at the hearing employer accepted liability for all past due medical benefits incurred through April 1997, and that the medical expenses at issue would be covered under this agreement, the administrative law judge acted within his discretion in inferring that these expenses were not "past due" as they were not shown to be related to claimant's work injury. Decision and Order at 13.

Claimant further asserts that inasmuch as employer had notice of the claim as of November 1995 but did not file its notice of controversion until on or about June 13,1996, if the Board reverses the administrative law judge and finds claimant entitled to additional disability compensation, he is entitled to a 10 percent penalty under Section 14(e) of the Act, 33 U.S.C.§914(e). Section 14(b) of the Act provides that the first installment of compensation becomes due on the fourteenth day after the employer has been notified pursuant to Section 12, 33 U.S.C. §912, or has knowledge of the injury. 33 U.S.C. §914(b). Section 14(d) sets forth the procedure for controverting the right to compensation, providing that an employer must file a notice of controversion on or before the fourteenth day after it has knowledge of the injury. 33 U.S.C. §914(d); *see also Spencer v. Baker Agricultural Co.*, 16 BRBS 205 (1984). Section 14(e) mandates that if an employer fails to pay benefits in accordance with Section 14(b) or timely controvert the claim in accordance with Section 14(d), then it shall be liable for a 10 percent penalty added to unpaid installments of compensation. *Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989); *Frisco v. Perini Corp.*, 14 BRBS 798 (1981). In the present case, although employer was voluntarily paying claimant compensation, as of October 13, 1994, it ceased its voluntary payments. Moreover, it is undisputed that on November 20, 1995, employer received notice of claimant's claim for additional compensation, but it did not make any additional payments or controvert the claim prior to June 13, 1996. Decision and Order at 2-3. If the administrative law judge determines that claimant is entitled to additional compensation on remand due to employer's making voluntary payments based on an incorrect average weekly wage, claimant is entitled to an assessment on the overdue compensation under Section 14(e). *See Browder v. Dillingham Ship Repair*, 25 BRBS 88, *aff'g on recon.* 24 BRBS 216 (1991).

Finally, claimant contends that inasmuch as his counsel filed a fee petition with the administrative law judge and employer did not file any objections, if the Board overturns the denial of benefits, it should award counsel the fee he requested from the administrative law judge, and should remand the case for a determination of his entitlement to additional fees and costs before the district director. Inasmuch as immediately prior to the hearing, employer agreed to pay some of claimant's medical bills which it had disputed previously, claimant's counsel was successful in establishing his right to additional compensation, and is accordingly entitled to a fee payable by employer pursuant to Section 28(b), 33 U.S.C. §928(b). *See generally Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993). However, as the Board's authority to award an attorney's fee is limited to that involving work performed before it on appeal, we cannot award claimant the fee requested for work performed before the administrative law judge. In order to obtain a fee for work performed at the other levels of the proceedings, counsel must request it from the tribunal before whom the work was performed. *See generally Smith v. Alter Barge Line, Inc.*, 30 BRBS 87, 89 (1996); *Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154, 160 (1996). On remand, the administrative

law judge should address counsel's fee petition.

Accordingly, the case is remanded for the administrative law judge to reconsider claimant's average weekly wage and entitlement to a Section 14(e) penalty for benefits due prior to October 1994 consistent with this opinion. In all other respects, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge